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Via Electronic Mail

Richard M. Thomas, Esquire
Associate General Counsel
Office of Government Ethics
1201 New York Avenue, NW
Suite 500
Washington, DC 20005-3917

Re: Comments to Proposed Amendment of Part 2635 in RIN 3209-AA04

Dear Mr. Thomas:

We appreciate the opportunity to submit these comments to the Office of Government Ethics ("OGE") on behalf of the authors regarding the proposed codification of the Ethics Pledge lobbyist gift ban and its subsequent application to all federal executive branch employees. Our experience tells us this proposal is not the best course to satisfy the original purpose of the executive branch gift rules. Elements of this proposal magnify the current rule's complexity, base the new restrictions on constitutionally suspect classifications, and likely will result in consequences not intended by the gift rule's purpose. We urge OGE, instead, to take this opportunity to reengineer its gift rule to promulgate comprehensive, reasonable, and clear guidelines that all may follow. Harmonizing the executive branch gift rule, including the Ethics Pledge lobbyist gift ban, with the House and Senate gift rules would do far more to accomplish OGE's goal than would implementing the changes proposed in RIN 3209-AA04.

INTRODUCTION

We (Ronald M. Jacobs and D. Edward Wilson, Jr.) are partners of Venable, LLP. Together, we have practiced law for nearly 50 years inside, and regarding interactions with, the federal government in the ethics field. We share our experience here on our own behalf, not as the comments of any client

with the purpose of assisting OGE in its mission of improving ethical conduct in the executive branch

About the Authors. Mr. Jacobs is a practitioner specializing in compliance with federal and state regulation of ethics, campaign finance, lobbying disclosure, pay-to-play, and other aspects of participation in elections and public policy. He represents businesses from sole proprietorships through multinationals, nonprofits, and advocacy organizations that cover the ideological spectrum. Mr. Wilson served as Associate Counsel to the President, Deputy and Acting General Counsel of the U.S. Treasury, as well as in other senior policymaking executive branch positions. His practice at Venable includes all aspects of the ethics rules at the federal level.

About Venable LLP. With nearly 600 attorneys in offices across the country practicing in all areas of corporate and business law, complex litigation, intellectual property, regulatory, and government affairs, Venable is one of the world's top 100 law firms. Our lawyers bring a wealth of experience to the challenges and opportunities our clients face, and are recognized in the business and legal communities as the leading practitioners in their fields. Many are former prosecutors, regulators, and lawmakers. The businesses we represent cover the full spectrum of industries and organization types, ranging from entrepreneurs and emerging growth companies to large national and international organizations. Venable's tax-exempt organization and trade association practices are among the largest and most influential in the country.

DISCUSSION

The current executive branch gift rule is complex. Many private sector individuals who interact with executive branch personnel also have dealings with legislative branch personnel. Some provisions of the executive and legislative branches' gift rules are equivalent, such as accepting gifts from family members. Others have similar names but very different requirements, such as the House and Senate "widely attended event" exemption and the executive branch "widely attended gathering" exception, which applies a different standard for agency attendee eligibility. Complying with both sets of gift rules at the same time is challenging at best, frequently frustrating. It is analogous to the witticism commonly attributed to Winston Churchill in de-

scribing America and England, "Two nations divided by a common language." Personnel of one branch, when considering whether to accept gifts provided in mixed executive-legislative branch contexts, suffer from this confusion as well and risk failing to comply. Individuals in the private sector suffer similarly when trying to structure substantive events to meet all applicable rules.

I. OGE Should Take This Opportunity to Simplify the Executive Branch Gift Rule.

Nearly 20 years ago, President George H.W. Bush ordered OGE's promulgation of the executive branch gift rule.[1] That Order charged OGE with promulgating "a single, comprehensive, and clear set of executive-branch standards of conduct that shall be objective, reasonable, and enforceable."[2] OGE fulfilled this directive. Yet recent modifications arising from the Ethics Pledge and, should OGE adopt it, this proposal, have weakened the gift rule's singularity, clarity, objectivity, reasonability, and enforceability.

A. The current gift rule is confusing and conflicts with its original purpose.

The purpose of the Executive Order signed by President G.H.W. Bush was to "ensure that every citizen can have complete confidence in the integrity of the Federal Government."[3] To meet this purpose, the rules carrying it into effect should be clear, concise, and easy to follow. In contrast, the current gift rule is dense, long, and confusing. Some gifts are not "gifts." Others are permissible under the exceptions, except in some cases when the donor is a "prohibited source" or because of the recipient's federal position. Still more are proposed for prohibition if the donor is a registered federal lobbyist or works for an organization that has registered under the Lobbying Disclosure Act of 1995 ("LDA"). Federal personnel contemplating the acceptance of an event

[1] Exec. Order No. 12731 (Oct. 17, 1990), amending Exec. Order No. 12674 (Apr.12, 1989) to establish the Gifts From Outside Sources regulation ("executive branch gift rule" or "gift rule"), *codified in* 5 C.F.R. pt. 2635. This Executive Order is, of course, just one in a series prescribing standards of conduct for government officers and employees, thus contracting in substance the opening line of the Notice of Proposed Rule Making to which these comments speak. *E.g.*, Exec. Order 11222 (signed by Lyndon B. Johnson, May 8, 1965).

[2] *Id.* at § 201(a).

[3] *Id.* at § 101.

invitation generally must seek pre-clearance from their Designated Agency Ethics Officials, and those ethics specialists must ascertain whether the donor is a prohibited source to identify which degree of scrutiny and finding they must apply in their determination. A gift often means something intangible, such as a service or free attendance at an event. Restricting intangible gifts is more complex than limiting the money, meals, and trinkets federal personnel may accept from outside sources.

What started as a laudable effort to create a universal and practical system has evolved, in the Executive Branch, into a maze that often discourages the private sector and the government from interacting with each other while creating a substantial threat of sanction for inadvertent violations. In contrast, the House and Senate gift rules simply define "gift" as anything of monetary value and prohibit all gifts unless one of 24 exemptions applies. House and Senate personnel are thus spared the two-step definitional and exceptive process that executive branch personnel must follow.

Lobbyists live and work together with federal employees and interact like ordinary people. Federal employees are aware of lobbyists' role of bridging their employers' interests with the government's actions. Creating artificially obtuse barriers to this interaction serves neither's best interest. Interacting with lobbying organizations occurs daily; computers, restaurants, newspapers, air travel—almost every product or service is provided by a business that employs lobbyists or is a member of a trade association or other nonprofit organization. Federal employees need many gift rule exceptions to just to interact with the private sector in daily life. The gift rule's original purpose of establishing clear, reasonable, and objective standards of conduct mandates a rule that is not overly complex in daily practice to the point of chilling legitimate interactions between citizens and federal personnel. Lobbyists—and particularly the entities that employ lobbyists that have day-to-day interaction with the government outside of their lobbyists—need rules that meet this goal in a way that comports with reality.

B. The proposal fails to support providing special treatment to 501(c)(3)s over other nonprofits and businesses.

Distinguishing one form of nonprofit from another regarding the risk of undue influence or an entity's presumed motivation is not helpful. Exempting only 501(c)(3) tax-exempt charities and foundations—and nonprofit institutions of higher education, professional associations, scientific organizations, and learned societies that are in many cases organized under Section 501(c)(3) of the tax code, too – from the Ethics Pledge and the gift rule's proposed all-employee lobbyist gift ban further complicates an overly complex regulation. We agree with OGE's exemption of 501(c)(3) nonprofits. Our concern lies in OGE's decision to withhold this exemption from other nonprofits such as trade associations and social welfare organizations.

The proposal's overcomplicated explanation of why certain other nonprofits deserve exemption from the lobbyist gift ban supports exempting all nonprofits. OGE appears to have recognized that many non-501(c)(3) nonprofits offer interesting programs and value to agencies. It simply could not articulate that in a way most people can understand. First, OGE proposes to exempt these professional associations, scientific organizations, and learned societies from the lobbyist gift ban only to the extent they act in their educational or professional development activities.[4] Then OGE bars federal personnel from using this limited exemption for invitations from lobbying organizations to attend "purely social events."[5]

This overly complex approach is unnecessary. Applying the existing "further agency programs and operations" criteria and prohibited source written finding requirements in Section 2635.204(g)(2) would screen-out any widely attended gathering invitations that failed to support permitting attendance by federal personnel because the event was purely social in nature.

The proposed formulation is not just complex, it invites stealth lobbying. As written, qualifying nonprofits would have no means of ascertaining the

[4] Standards of Ethical Conduct for Employees of the Executive Branch; Proposed Amendments Limiting Gifts From Registered Lobbyists and Lobbying Organizations, 76 Fed. Reg. 56330 at 37 (proposed Sept. 13, 2011) (to be codified at 5 C.F.R. pt. 2635) ("OGE Proposal").

[5] OGE Proposal at 56337.

boundaries of the lobbying organization event eligibility criteria. Whether OGE intends the "purely social" or "educational" criteria to restrict federal personnel attendance at events sponsored by an LDA-registered 501(c)(3) that also happens to be a professional association – or if that nonprofit would qualify for the broader 501(c)(3) exemption instead – is unclear. Lobbyists' interpretations of "educational" or "social" may vary widely from what OGE intends but has not defined. A bar association could, for example, seek to influence government lawyers in a continuing legal education course more than a trade association could attempt to influence Environmental Protection Agency employees at a green energy trade show. An alternative approach would reduce the proposal's complexity: restricting federal employees' attendance at lobbying organization events only if they are purely social and lack either substantive content that would benefit the agency's mission or its employees' professional skills, or an important representational component (e.g., certain charity events).

In its proposal, OGE bases preferential treatment for 501(c)(3)'s at the exclusion of most other nonprofits on three faulty assumptions:

1. Tax Law Limits.

The proposal references the legal limit on 501(c)(3)s' lobbying activity to support exempting these organizations from the lobbyist gift ban.[6] In reality, the relevant tax code definitions vary substantially from those provided by the LDA.[7] Distinguishing 501(c)(3)s from other nonprofits or businesses in this context fails to support denying the lobbyist gift ban exemption to all other private sector organizations. Tax law permits "no substantial part" of a 501(c)(3)'s activity to constitute "carrying on propaganda, or otherwise attempting, to influence legislation."[8] The IRS has never established an objec-

[6] OGE Proposal at 56335 (noting the limit, without quantification or citation to legal authority).

[7] *See generally Methodology*, Center for Responsive Politics, at www.opensecrets.org/lobby/methodology.php (explaining the distinctions between various LDA lobbying expenditure calculation methods). "[T]he list of covered public officials under the [Internal Revenue Code] is much narrower than the set covered by the LDA. Thus, lobbying expenditures may not be strictly comparable among organizations." *Id.*

[8] Treas. Reg. §1.501(c)(3)-1(c)(3)(iv).

tive "no substantial part" test, using an *ad hoc* facts and circumstances test instead. What constitutes "influencing legislation" under the "no substantial part" test has no bright-line definition, either.

501(c)(3) public charities may elect, under Section 501(h) of the tax code, however, to follow a bright-line limit of permissible lobbying activity that uses a clear definition of applicable expenditures. The maximum annual lobbying expenditure under this "501(h) election" is $1,000,000 for a charity that spends over $17,000,000 on its charitable, "exempt-purpose" activities (lower caps correspond to reduced levels of exempt-purpose spending).[9] Electing this option requires using the tax law definition of "influencing legislation."[10]

As defined in the tax code, "influencing legislation" does not include attempting to influence executive branch actions – only bills, resolutions, and other *legislative* actions.[11] Thus, a 501(c)(3) charity could exceed the Section 501(h) maximum lobbying expenditure limit when influencing executive branch officials regarding agency policy or regulations. That expenditure would be completely opaque, not disclosed in IRS Form 990 or LDA Form LD-2 reports if the 501(c)(3) elects to use the tax code Section 4911 definition for LDA reporting purposes.

By contrast, lobbying firms must use the LDA's definition of "lobbying activity" for purposes of triggering LDA registration and disclosing lobbying income in quarterly Form LD-2 activity reports.[12] That definition is broader, covering any communication, with or without an attempt to influence, regarding a federal matter, including related background work, with the President, the Vice President, a member of the White House staff, an executive branch political appointee, or a military general or admiral.[13] Businesses and trade

[9] 26 U.S.C. § 501(h).

[10] 26 U.S.C. § 6033(b)(8).

[11] *See* 26 U.S.C. § 4911(d) (defining "influencing legislation" without including executive branch-related activities beyond "attempt[ing] to influence any legislation through communication with any . . . government official or employee who may participate in the formulation of legislation").

[12] Lobbying Disclosure Act of 1995, as amended § 1610, 2 U.S.C. § 1601, *et seq.* ("LDA").

[13] LDA §§ 1602(8)(A), (3).

associations may apply either the LDA's "lobbying activity" definition or the definition of nondeductible lobbying expenses in Section 162(e) of the tax code.[14] This latter definition excludes the cost of lobbying executive branch department personnel below the level of a Cabinet Secretary and his/her immediate deputy regarding administrative action.[15]

Regardless of the LDA expense calculation method a business elects, the tax code requires payment of federal income tax on 100 percent of its lobbying expenditures under the Section 162(e) definition by precluding these costs' deduction as business expenses. In this sense, a business has more reason to restrain its lobbying activity than a nonprofit because it must spend its after-tax profits to lobby. Trade associations must either pay the tax due on their own Section 162(e)-defined lobbying activities or pass the tax obligation to their corporate members as nondeductible portions of member dues payments.[16] To paraphrase Supreme Court Chief Justice John Marshall, "The power to tax is the power to *dissuade*." Tax law therefore presents non-501(c)(3) entities with their own real-world limit on lobbying.

Thus OGE cannot rely on the tax law restriction of 501(c)(3)s' lobbying activity to justify distinguishing them from businesses or other nonprofits.

2. Activities of particular interest and value to agencies.

OGE states that 501(c)(3)s' exempt purposes "often involve activities of particular interest and value to agencies."[17] We agree completely. Yet the proposal overlooks the interest and value other nonprofits or businesses' activities provide to agencies. How can OGE distinguish one nonprofit's mission from another's? Nonprofits and businesses that do not qualify for one of the four categories of preferred gift donors in OGE's proposal provide critical information and opportunities for federal personnel to hear firsthand from the private and noncommercial sectors. There is no substantial difference be-

[14] LDA § 1610(b).

[15] 26 U.S.C. § 162(e)(6)(D).

[16] 26 U.S.C. § 162(e)(3).

[17] OGE Proposal at 56336.

tween a 501(c)(3) and another nonprofit in the context of a widely attended gathering or social invitation exception or meal provided under the *de minimus* exception.

Barring trade associations and other non-501(c)(3) nonprofits from the exemption simply because their primary concern "generally is not the education and development of members of a profession or discipline,"[18] – an overgeneralized assumption – is arbitrary and capricious. Many nonprofits are organized under Section 501(c)(4) of the tax code as social welfare organizations. Trade associations organized under Section 501(c)(6) likewise operate as nonprofits. These organizations cover the gamut of interests and political philosophies, from Sierra Club to the National Rifle Association. Most are much smaller, focused on serving distinct communities of interest. All operate as nonprofits. Many facilitate meetings between subject matter experts and federal officials to discuss policy and share perspectives, as well as to educate their members. They offer particular interest and value to agencies, too. Their mission to educate or benefit classifications of individuals broader than a profession or discipline cannot support denying them the exemption granted to 501(c)(3)s.

Attending meetings, particularly under the "widely attended gathering" exception, sponsored by trade associations and other non-501(c)(3) nonprofits permits direct government - private sector interaction. We recognize the proposal would permit federal personnel to participate in lobbyist-sponsored widely attended gatherings as *speakers*.[19] Yet the proposal does not account for the value federal personnel receive when they participate solely as *attendees*, whether hearing private sector speakers' remarks or discussing real-world situations in small group settings after an event's formal session has ended. This is particularly important for career employees who are not invited to speak, but who gain insight as attendees from the free flow of ideas between event participants.

Permitting federal appointees and career employees to interact with the private sector at events is essential to administering an agency and to business-

[18] OGE Proposal at 56338.

[19] OGE Proposal at 56333.

es and nonprofits' understanding of agency priorities. The coincidence of a private sector organization's LDA registration and interaction between its employees and federal personnel should not restrict their participation in these events. Meals often are necessary when events last more than a few hours or are scheduled to enable participants' attendance during work breaks. Events such as plant visits to demonstrate pollution abatement improvements, all-day meetings with software companies to discuss cyber security, touring a production facility to see firsthand how a new technology is evolving, and luncheon seminars to discuss industry responses to new federal regulatory requirements all come to mind as naturally requiring a meal.

Common sense limits, such as requiring consumption in a common setting, would more reasonably serve to prevent undue influence. And retaining the $20 *de minimus* exception, with appropriate indexing to inflation since its 1992 inception, for career employees at the very least would serve both OGE's mission and private sector hosts' need for clear guidance.

One could view the proposal's treatment of the widely attended gathering exception as limiting citizens' interaction with government officials to *when the government is speaking*. By forbidding all executive branch personnel from attending an event when they have no formal speaking role, the proposal would inhibit *citizens' ability to share their views* with federal officials.[20] We do not hold this view, but others might. In any event, the government cannot limit lobbyists' interaction with federal officials based on presumptions of gift donors' "good" or "bad" motives to interact with government officials. Restricting some donors, but permitting others, to provide gifts of free attendance to

[20] We also note the lack of available OGE guidance regarding the exclusion of "modest items of food and refreshments" from the definition of "gift" in 5 C.F.R. § 2635.203(b)(1). For example, OGE's gift rule manual does not define the food or refreshments permissible under this exclusion beyond repeating the rule's examples of non-meal "soft drinks, coffee, and donuts." *Standards of Ethical Conduct for Employees of the Executive Branch* (June 2009), pg. 9, at www.usoge.gov/Laws-and-Regulations/Employee-Standards-of-Conduct/Employee-Standards-of-Conduct/. In our experience, agency DAEOs most often ignore this exclusion for private sector receptions, applying the widely attended gathering eligibility criteria instead. Without OGE guidance on this topic, many LDA-registered organizations will have no means to invite federal officials to commonplace receptions or morning meetings if OGE amends the gift rule as proposed. The House and Senate do not bar this sort of interaction. Their gift rules permit congressional personnel to attend similar lobbying organization-funded events under the House and Senate gift rules' "reception" exemptions (i.e., non-meal food and beverages of nominal value without restriction to soda, coffee, and donuts).

federal officials because one group is presumed to have good intentions without some basis in fact appears contrary to the First Amendment right to petition the government for redress of grievances. It is also arbitrary and capricious.

Thus OGE cannot rely on 501(c)(3)s' presumed monopoly on providing particular interest and value to agencies to justify distinguishing them from businesses or other nonprofits.

3. Receipt of Federal Funds.

Two years ago, OGE and the White House Counsel's Office exempted 501(c)(3)s from the Ethics Pledge lobbyist gift ban for the same tax law and presumed motive (*i.e.*, educational, charitable, or scientific purpose) bases that OGE discusses in the proposal at issue here.[21] OGE concluded these factors, and restrictions in 31 U.S.C. § 1352 on using federal funds to lobby, justified singling-out 501(c)(3)s above all other forms of voluntary association for purposes of excluding them from the lobbyist gift ban.[22] This latter basis, too, fails to support exempting only 501(c)(3) nonprofits. Again, we agree with OGE's exemption of 501(c)(3)s from the proposed lobbyist gift ban; our concern is the exemption is too narrow and should include other all other nonprofits.

The cited prohibition of using federal funds to lobby for federal contracts, grants, loans, or cooperative agreements applies to all persons, not just to 501(c)(3)s.[23] This "Byrd Amendment" restriction imposes no restriction solely on a 501(c)(3) that would inhibit it from engaging in the practices President Obama, OGE, and the White House Counsel's Office have sought to curb. It

[21] Office of Government Ethics, DAEOgram DO-09-007, Lobbyist Gift Ban Guidance (Feb. 11, 2009) at pg. 5.

[22] Office of Government Ethics, DAEOgram DO-09-007, Lobbyist Gift Ban Guidance (Feb. 11, 2009) at pg. 5 (concluding, "Furthermore, any 501(c)(3) organizations that receive Federal funds are subject to limitations on the use of those funds to lobby for Federal contracts, grants, loans or cooperative agreements. *See* 31 U.S.C. § 1352.").

[23] 31 U.S.C. § 1352 (referencing the "recipient," "any person," or "each person" without limiting the prohibition and disclosure requirements to 501(c)(3) organizations, excluding only Indian tribal organizations).

applies equally to all other nonprofits, businesses, and individuals. The Byrd Amendment prohibits private sector persons from using federal funds to lobby for more federal funds.[24] We do not object to this restriction, only OGE's misplaced reliance on it as grounds for granting 501(c)(3)s special treatment under the lobbyist gift ban.

Thus OGE cannot rely on a conclusion that restrictions on use of federal funds to lobby for federal contracts, grants, loans, or cooperative agreements supports exempting 501(c)(3)s any more than other nonprofits or businesses.

C. We recommend following Congress' lead by harmonizing the gift rule with the House and Senate gift rules and lobbyist gift bans.

OGE should consider following Congress' example in regulating lobbyists' gifts to legislative branch personnel. The House of Representatives and Senate have enacted largely consistent gift rules following substantial debate. In 2007, Congress responded to the Jack Abramoff scandals by strengthening the House and Senate gift rules to prevent future abuse.[25] In enacting the

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[24] Perhaps OGE erred, intending to cite the LDA instead: "An organization described in section 501(c)(4) of Title 26 which engages in lobbying activities shall not be eligible for receipt of Federal funds constituting an award, grant, or loan." LDA § 1611. This provision is more consistent with OGE's logic, yet would apply to 501(c)(4) social welfare organizations, not to 501(c)(3) charities or private foundations.

[25] Honest Leadership and Open Government Act, 121 Stat. 735 (2007). On this point, we wish to correct two factual inaccuracies on page 56332 of the OGE Proposal:

A. Asserting the equivalency of the House/Senate "under $50" exemption with the executive branch gift rule's *de minimus* ($20) exception is incorrect. True, congressional personnel may no longer use the "under $50" exemption to accept gifts from lobbyists and lobbying organizations. But they may in fact accept lobbyist gifts provided under the House "item of nominal value" or identical Senate "item of little intrinsic value" exemptions (up to $10 per gift, slightly more for baseball caps and tee shirts). Rules of the U.S. House of Representatives, Rule XXV(5)(a)(3)(W); Rules of the U.S. Senate, Rule XXXV(c)(23); *see generally* U.S. House of Representatives, Committee on Standards of Official Conduct, *House Ethics Manual* (2008 ed.), at ethics.house.gov/sites/ethics.house.gov/files/documents/2008_House_Ethics_Manual.pdf (explaining the exemption's meaning and limits).

B. Another factual inaccuracy is the misstatement, "[I]t is nonetheless clear that both Houses of Congress intended to preclude lunches and other items from lobbyists even if the gifts were valued well below the de minimus threshold." This statement is factually untrue. The House and Senate gift rules retain a number of meal exemptions congressional personnel may use to accept lobbyists' gifts, including the "widely at-

Honest Leadership and Open Government Act, Congress declared its intent that "any applicable restrictions on congressional officials and employees" should also apply to the executive branch.[26]

House and Senate gift rules are less complex than the executive branch version, with more reasonable exemptions and a better balance between reform and recognition of how lobbyists and government personnel interact in the real world. Lobbyists and non-lobbyists have more confidence in complying with the House and Senate gift rules than the executive branch version. More detailed guidance is available for the congressional rules, such as the *2008 House Ethics Manual*.[27] Navigating the contradictory and overlapping legislative and executive branch rules and exemptions is too complex and risks harming both compliance and transparency.

Conforming the executive branch gift rule to those Congress has found satisfactory would better meet OGE's mission and the executive branch gift rule's original purpose.

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tended event," "constituent event," "charity event," "site visit," and lobbyist-paid travel exemptions. Citing only a portion of the Senate ethics committee's post-HLOGA statement, "Senators and staff may no longer accept gifts of any value from registered lobbyists," further misrepresented current legislative branch gift rules. The proposal omitted that statement's qualification, "However, these limits don't apply if a gift falls under one of 24 specific exceptions." To correct the record, following is the Senate Select Committee on Ethics' statement of the rule:

> Members, officers, and employees of the Senate may not accept any gift from a registered lobbyist or foreign agent, or an entity that employs or retains a registered lobbyist or foreign agent, *unless a specific exception to the Gifts Rule applies.*

U.S. Senate, Select Committee on Ethics, *No Gifts from Lobbyists*, at www.ethics.senate.gov/public/index.cfm/gifts (emphasis added).

[26] Honest Leadership and Open Government Act, 121 Stat. 735, § 701 (2007). "It is the sense of the Congress that any applicable restrictions on congressional officials and employees in this Act should apply to the executive and judicial branches." *Id.*

[27] U.S. House of Representatives, Committee on Standards of Official Conduct, *House Ethics Manual* (2008 ed.), at ethics.house.gov/sites/ethics.house.gov/files/documents/2008_House_Ethics_Manual.pdf.

II. Attempting to control lobbyists' access through the gift rule would fail to achieve OGE's purpose.

When justifying the proposal's ban on federal personnel attendance at lobbying organization-paid events, OGE stated access, not gift giving, is the problem:

> If one views the problem of lobbyist gifts as the mere potential for some quid pro quo, then probably an invitation to a gala ball will not directly influence an official to take action benefiting the giver. But it is increasingly recognized that the more realistic problem is not the brazen quid pro quo, but rather the cultivation of familiarity and access that a lobbyist may use in the future to obtain a more sympathetic hearing for clients.[28]

Thus OGE acknowledges the low probability of improperly influencing federal personnel through free attendance at a lobbying organization's event, even at a "gala ball." Instead, OGE identifies the problem as the "cultivation of familiarity and access" at a widely attended gathering or the "general good will" gained from interactions with executive branch personnel at a social invitation event.[29] If lobbyist interaction is the problem, amending the gift rule is the wrong solution. Gift rule restrictions become moot when federal employees pay to attend events. OGE can do nothing to stop this interaction if there is no "gift" to restrict.

We have seen a trend in events sponsored by LDA-registered organizations in the years following Congress' 2007 and OGE's 2009 gift rule modifications. Government employees who want to attend a lobbyist-sponsored event will pay for their tickets, whether with personal funds or by obtaining agency payment through ordinary agency processes. Paying market value under OGE's rule removes the goods and services provided at the event from the definition of "gift."[30] Sponsors, in our experience, charge a ticket's face value or the actual per-capita cost when no ticket face value exists, to comply fully

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[28] OGE Proposal at 56333.

[29] OGE Proposal at 56333.

[30] 5 C.F.R. §§ 2635.203(b)(9) (employee payment) and (7) (government payment).

with applicable regulations. Projecting this trend into the future suggests an increasing number of executive branch personnel paying for event tickets.

Implementing the lobbyist gift ban would be counterproductive. OGE would fail to restrict lobbyists' access to federal personnel at social events that attract federal personnel willing to buy their own tickets. Agencies would lose their visibility into employees' attendance at the very events OGE is concerned will lead to improper familiarity with lobbyists because federal employees would not need to consult Designated Agency Ethics Officials for advance approval. Agencies would also lose the opportunity to send employees for free to more mundane lobbying organization-sponsored events such as industry symposia, training seminars, trade shows, and other events that relate closely to employees' official duties, where no lobbyist is likely to be present. Employees would be denied the opportunity to learn firsthand from industry experts and to better understand the industries and technologies they regulate.

Designated Agency Ethics Officials are better able to prevent abuse than is a broad prohibition, especially when writing a personal check moots the lobbyist gift prohibition. Retaining the current pre-clearance procedures and findings requirements would more ably serve OGE's goal of preventing the perceived harm of lobbyists interacting with executive branch employees in social settings. Our recommendation for a long-term solution is to harmonize the executive branch gift rule's widely attended gathering exception with the House and Senate "widely attended event" exemption.

III. The premise of changing the rule to eliminate certain exceptions for lobbyists is mistaken and based on constitutionally suspect classifications.

In its proposal, OGE states its respect for the First Amendment and restates its lack of intent "to erect unnecessary barriers to interaction between appointees and journalists."[31] The First Amendment protects journalists and lobbyists alike:

[31] OGE Proposal at 56337 (citing Office of Government Ethics, DAEOgram DO-09-007, Lobbyist Gift Ban Guidance, pp. 5-6 (Feb. 11, 2009)).

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, *and to petition the Government for a redress of grievances*.[32]

The government cannot choose to honor some constitutional rights and ignore others, particularly when they are contained in the same sentence. If OGE were to comply fully with the First Amendment when shielding journalists from unnecessary barriers to interaction with federal officials, it would shield lobbyists too.

A. The proposal fails to justify special treatment of media organizations.

OGE supports exempting media organizations from the lobbyist gift ban by relying on LDA treatment of media organizations and their "unique constitutional role."[33] This reliance fails. The cited LDA provision is merely part of the definition of reportable "lobbying activity," used to exempt journalists' news gathering contacts with government officials from the LDA's *registration and reporting* requirements.[34] OGE finds interactions between journalists and government officials at press dinners "foster relationships that further the news gathering functions of the organizations."[35] This cannot be squared under the First Amendment with OGE's objection to lobbyists fostering social bonds with government officials.[36]

We agree with OGE's exemption of media organizations from the lobbyist gift ban. Government interaction with the media at press dinners is important. So, too, is petitioning the government for redress of grievances. OGE's restriction of this exemption to gifts made "in connection with the [media] or-

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[32] U.S. Const. amend. I (emphasis added).

[33] OGE Proposal at 56337.

[34] *See* LDA § 1602(8)(B)(ii) (exempting journalist-government contact from the definition of "lobbying contact").

[35] OGE Proposal at 56337.

[36] OGE Proposal at 56333.

ganization's information gathering or dissemination activities"[37] is further proof of OGE's drawing the wrong distinction. "Access" by itself is not only constitutionally protected; OGE has recognized its benefits regarding the media's news gathering and dissemination activities. What the proposal has failed to articulate is why access at other LDA registrants' events needs restriction.

Congress has not seen fit to provide special treatment of media organizations in the context of congressional *gift rules* or contributing money to campaigns. Does the First Amendment support preferential treatment of media organizations regarding access to, and relationships with, government officials at the expense of most other organizations that employ LDA-registered lobbyists? Of course not. No law or regulation may treat media organizations and other corporations differently regarding political speech.[38]

B. Combatting corruption is no longer sufficient under strict scrutiny analysis to infringe a fundamental constitutional right.

Underlying the proposal's goals is the government's response to previous incidents of public corruption, particularly the Jack Abramoff scandals.[39] A related concern is lobbyists' use of gifts to "obtain access to the political leadership in the Executive Branch."[40] OGE identifies the "cultivation of familiarity and access," "foster[ing of] a social bond," "cultivation of relationships through social events as 'soft lobbying,'" and using social events "to build general good will within a class of employees in case access is needed for a future issue or client" as threatening real harm in the context of lobbyist-paid attendance at widely attended gatherings and social invitations.[41] Put anoth-

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[37] OGE Proposal at 56337.

[38] *See, e.g.*, *Citizens United v. Federal Election Commission*, 130 S.Ct. 876, 906 (2010) (declaring, "The differential treatment [of media corporations and other corporations regarding independent expenditures] cannot be squared with the First Amendment.").

[39] *E.g.*, OGE Proposal at 56331 ("The stricter [lobbyist gift ban] requirements were in large part a response to various scandals involving the use of gifts by lobbyists such as Jack Abramoff….").

[40] OGE Proposal at 56331.

[41] OGE Proposal at 56333.

er way, the government here is attempting to restrict lobbyists' access to executive branch personnel to prevent the harm of future or implied corruption.

Last year, the U.S. Supreme Court addressed the government's constitutional limits in combatting corruption within the context of another First Amendment controversy, whether corporations could pay for advertisements that urged the election or defeat of federal candidates. The majority decision in *Citizens United v. Federal Election Commission* ("*Citizens United*") overturned this speech restriction as contrary to the First Amendment.[42]

Specifically, the Court declared that "ingratiation and access" do not constitute corruption.[43] The proposal's efforts to restrict lobbyists' "cultivation of familiarity and access" thus fall short of the goal the proposal attempts to reach. The U.S. Criminal Code classifies fraud, bribery, gratuity, and conspiracy as felony offenses. The Department of Justice and the courts, not OGE, are better suited to prevent this sort of abuse. In any event, Jack Abramoff and his co-conspirators went to prison with felony convictions for fraud, tax evasion, and conspiracy to bribe public officials, not for violating an OGE gift rule.

IV. The Proposed Rules' Structure Invites Evasion.

We urge OGE to consider the consequences of implementing the proposal. Expanding the lobbyist gift ban will produce consequences OGE does not intend and very likely will not find helpful in fulfilling its mission.

A. Career employees will face burdensome compliance challenges.

The vast majority of our nation's 2.8 million executive branch employees will never interact with registered lobbyists. Yet many will have dealings with these lobbyists' employers on a daily basis. Interacting with a *lobbying organization* is very different from interacting with a *lobbyist*. The number one

[42] *Citizens United*, 130 S.Ct. at 913.

[43] *Citizens United*, 130 S.Ct. at 910.

company on the Fortune 500 list, for example, employs 2.1 million people,[44] but only 14 are active federal lobbyists.[45] Requiring federal personnel to determine whether a particular donor is a registered lobbyist or lobbying organization may be too much to expect. A political appointee in Washington, DC, is more familiar with the lobbyist gift ban, and how to query the House or Senate LDA databases, than is a career employee in the Midwest who is invited to see the latest distribution center and offered lunch during the tour because of its remote location.

Failure to take what, for most career government employees, are extreme steps may expose them to substantial penalties and personnel actions even if the donor has no intent to violate the rule. The government employees would need to ascertain a prospective donor's eligibility as an LDA registrant, prohibited source, or as another donor whose motivation behind the gift may or may not relate to the recipient's status as a federal employee. Next they would need to analyze the proposed gift's eligibility under the gift rule's various definitions, exceptions, and prohibited source rules. Some exceptions are available, or not, based on the prohibited source's donor status, "official position," and LDA registration criteria. We fear the accretion of gift rule requirements may lead some employees to dismiss the review process altogether and either accept the proposed gift without review or refuse all offers, thereby denying acceptance of valid donations that are of value to the government. None of these results will benefit the public interest.

B. Innocent donors risk their own and federal employees' compliance.

We see a substantial risk of technical gift rule violations arising from a lack of communication in the "Regular Joe" worlds of lobbying organizations and federal agencies. Large corporations and nonprofits may have only four or five LDA-registered lobbyists, who generally live and work in the Washington, DC area. Their interaction with the organization's other employees –

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[44] *Fortune 500 List*, Fortune, at money.cnn.com/magazines/fortune/global500/2011/snapshots/2255.html.

[45] U.S. House of Representatives, Clerk of the House, LDA database (yielding search results of 14 individual Wal-Mart Stores, Inc. lobbyists in 2011 LD-2 reports), at disclosures.house.gov/ld/ldsearch.aspx.

machinists, clerks, salesmen, managers, *et al.* – is very often limited to senior executives. Most of their fellow, non-lobbyist employees may have no idea the company is even registered under the LDA or what that means to them. The lobbyists and counsel can communicate this news to others, but people engaged in executing the organization's daily work outside the Beltway likely will focus on other matters instead.

Likewise, many federal employees who ordinarily have no interaction with lobbyists will not concern themselves with the lobbyist gift ban despite OGE's efforts. They, too, focus on their daily work. Foreseeing many federal employees' view of the lobbying gift ban as something that will never apply to them is not difficult, despite their daily interaction with *lobbying organizations*. As discussed above, the vast majority of federal employees outside the political appointee ranks have no practicable means of navigating the proposed additional gift rule complexities.

Donors who have no intent to violate the gift rule or to provide improper benefits to federal employees should not overly concern OGE. Yet the proposal, if implemented, would subject innocent donors and recipients to great risk of penalty from inadvertent violations. The irony is clear: those least likely to violate the lobbyist gift ban purposefully are more likely to do so inadvertently because they lack the awareness and the tools to navigate an overly-complex rule successfully.

C. Donors who seek to evade the new restrictions can do so easily by manipulating their LDA registration and gift-giving structure.

By defining "registered lobbyist or lobbying organization" to include an organization or individual listed on an LDA registration,[46] the very structure of the lobbyist gift rule offers donors a clear path around the restriction.[47] OGE

[46] OGE Proposal at 56339.

[47] As a minor factual matter, we also point out that many individual lobbyists are not listed on their employers' LDA Form LD-1 "registrations," as the proposed amendment to Section 2635.203 defines "registered lobbyist." The LDA requires an entity to disclose in its LDA registration those individuals whom it knows, at the time of registration, have met the definition of "lobbyist" or whom the entity "expects to act as a lobbyist" in the future. LDA § 1603(b)(6).

recognizes the LDA's exclusion of registrants' affiliated entities,[48] but perhaps not its unintended consequence with respect to the lobbyist gift ban. As practitioners, we applaud OGE for adopting an objective test. At the same time, however, we recognize that adopting the LDA's definitions of which unique legal entities are covered "lobbying organizations" simplifies evasion. The defined class of covered entities depends in turn on the LDA's requirements for which legal entity is the "client" or "registrant."

An organization that wishes to evade the lobbyist gift ban may do so by providing an otherwise compliant gift to an executive branch appointee or other employee through another, non LDA-registered entity in its corporate structure. At registration, a lobbying firm or employer of in-house lobbyists that has triggered the LDA registration requirement lists itself as the "registrant" on Line 3 of LDA Form LD-1. That is enough, by itself, to qualify that specific legal entity as a "lobbying organization" under the proposed amendment to Section 2635.203. Yet the proposed lobbyist gift ban would not reach an LDA-registered organization's affiliates.

Consequently, an organization may legally evade the lobbyist gift ban's restrictions while remaining in full compliance with the LDA. Doing so is easy: provide the gift to an appointee or other federal employee through an affiliated organization that has no employee who has triggered the LDA registration requirements. Executive branch personnel could not know the stated donor is connected to the LDA registrant since the donor's organization is not listed as a "registrant" in the House and Senate LDA databases.

Some LDA-registered donors likely would de-register to avoid the proposal's new restrictions. The LDA permits "termination" where an organization has no employee who meets the LDA registration tests. Likewise, individual lob-

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Over time, the entity will hire new employees or assign lobbying duties to individuals who previously did not meet the "lobbyist" definition. LDA registrants simply list these new lobbyists on quarterly LDA Form LD-2 activity reports pursuant to LDA § 1604(b)(2)(C). They need not file new, or amend previous, LD-1 registrations when adding or terminating individual lobbyists. Thus many registered lobbyists technically would fall outside the four corners of the proposed definition of covered "registered lobbyists."

[48] OGE Proposal at 56336 (quoting official LDA guidance and incorporating it into the Note to follow the proposed Section 2635.203(h)).

byists may see the expanded lobbyist gift ban as a reason to de-register or to avoid registration in the first place. We saw the first wave of de-registration in 2008, when then-Senator Obama and the Democratic National Committee announced they would not accept campaign contributions from individual registered lobbyists. The second wave came in early 2009, following the Ethics Pledge.[49]

This trend is continuing. One recent survey, for example, found that 57 percent of respondents from organizations that de-registered individual lobbyists since 2009 said the Obama Administration's ethics reforms influenced their decision.[50]

D. Donors may also evade the lobbyist gift ban through affiliated 501(c)(3)s.

Because the proposal exempts 501(c)(3)s and their lobbyist and non-lobbyist employees from the expanded lobbyist gift ban, they may provide otherwise compliant gifts to any executive branch employee. We disagree with OGE's decision to provide this special treatment to only 501(c)(3) and scientific organizations, learned societies, or professional organizations, and not to other nonprofits as discussed above in Section I(B). But we also must note the prevalence of entities that operate both as a 501(c)(3) and as a business or 501(c)(4) social welfare organization, 501(c)(5) labor union, 501(c)(6) trade association, or other nonprofit.

Some 501(c)(4) social welfare organizations formed 501(c)(3) entities to maintain their overall eligibility to lobby and receive federal funds under Section 18 of the LDA. Other businesses, indeed some lobbying firms, and nonprofits

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[49] *See generally* Dave Levinthal, Center for Responsive Politics, *Lobbyists Terminating Their Federal Registrations at Accelerated Rate* (Nov. 2, 2009), at www.opensecrets.org/news/2009/11/lobbyists-terminating-their-fe.html.

[50] Center for Lobbying in the Public Interest, *Collateral Damage[:] How the Obama Administration's Ethics Restrictions on Public Service Have Harmed Nonprofit Advocacy and the Public Interest*, pg. 9 (Sept. 2011), at www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=5&ved=0CD4QFjAE&url=http%3A%2F%2Fwww.opensocietypolicycenter.org%2Fpub%2Fdoc_184%2FCollateralDamageCLPI102011.pdf&ei=GP-7Tue5N-b30gH3w_XdCQ&usg=AFQjCNH92qq6AESCiM37yLWabclVelwXDA.

control 501(c)(3)s to qualify for tax-deductible grants and contributions for community projects. The means and motives vary. Their common characteristic is the ability to operate through an affiliated 501(c)(3) organization. This permits them to, for example, have the affiliated 501(c)(3) sponsor a widely attended gathering and invite federal employees. The 501(c)(3) would be subject only to tax law limits on permissible activities IRS-defined "lobbying," which excludes advocacy regarding agency action. As discussed above, in Section I(B)(1), these tax code limits are not suited to restricting lobbying efforts regarding executive branch administrative action.

E. Net Effect: Failure to achieve OGE's goals and reduced transparency.

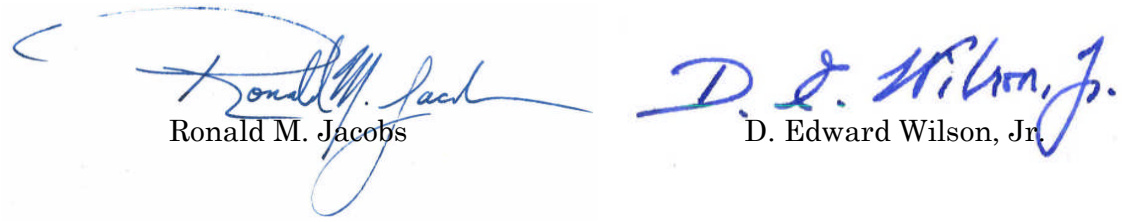
Based on our experience – in advising clients and serving in the government – with the full range of ethical restrictions at the federal, state, local, and international levels, we foresee the unintended consequences described above. The proposal seeks to solve one problem, the perceived harm arising from lobbyists' access to federal employees. It fails to account for the negative collateral damage that will result. Confusion among donors and federal employees, constitutionally suspect classifications, evasion, and reduced transparency all will harm OGE's efforts to improve ethical practices in the executive branch.

CONCLUSION

Instead of adding a new layer of restrictions to the already confusing array of definitions, source prohibitions, and exceptions, we recommend reengineering the executive branch gift rules to track those of the House and Senate. Government employees in both branches would share a common gift regime that has proven to work well. Adopting the House/Senate framework would also recognize Congress' leadership in this aspect of the law, benefit from its extensive debate in crafting its rules, and experience in implementing them. No gift rule provision will stop a willful and knowing attempt to bribe a public official. The Department of Justice has prosecuted Jack Abramoff and other serious violators successfully under the U.S. Criminal Code. Imposing new restrictions, with suspect classifications of exempt donors, to restrict lobbyists' *access* rather than *gifts* is not the best approach.

We know OGE is dedicated to improving ethics in government. We hope it adopts the right course here and does not cause more problems than it solves.

Respectfully submitted,



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D. Edward Wilson, Jr.